Supreme Court, U.S.
FILED

No. 001551 APR 10 2001

OFFICE OF THE CLERK

In The

Supreme Court of the United States

STEVEN CURTIS McINTOSH,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Whether a conviction under 21 U.S.C. § 846 requires a finding that the victim's death was the reasonably foreseeable result of the defendant's actions in order to invoke the enhancement penalty under 21 U.S.C. § 841(b)(1)(A) for a resultant death?

II. Whether an enhancement fact that increases the mandatory *minimum* sentence for a crime must be submitted to a jury, and proved beyond a reasonable doubt, a question reserved for "another day" in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 2361 n.13, 147 L. Ed. 2d 435 (2000), holding that a fact that increases a penalty beyond the prescribed statutory *maximum* must be submitted to a jury?

TABLE OF CONTENTS

Page

Questions Presented i

Table of Contents ii

Table of Authorities iv

Opinions Below 1

Jurisdiction 1

Constitutional Provisions, Statutes and United States Sentencing Guidelines Involved 1

Statement of the Case 4

Reasons Relied on for Allowance of the Writ 7

I. PETITIONER'S SENTENCE WAS ERRONEOUSLY ENHANCED WHEN THE SENTENCING COURT FAILED TO REQUIRE A FINDING OF REASONABLE FORESEEABILITY AS DIRECTED BY 21 U.S.C. § 846 AND U.S.S.G. § 1B1.3(a)(1)(B) IN ORDER TO ENHANCE PETITIONER'S SENTENCE UNDER 21 U.S.C. § 841(b)(1)(A) 7

II. PETITIONER WAS DENIED DUE PROCESS, AND NOTICE AND TRIAL GUARANTEES, WHEN THE DISTRICT COURT EMPLOYED A MERE PREPONDERANCE OF THE EVIDENCE STANDARD TO DETERMINE WHETHER DEATH RESULTED FROM THE USE OF DRUGS FOR WHICH *PETITIONER* WAS RESPONSIBLE AND, BASED ON THAT FINDING, INCREASED PETITIONER'S MANDATORY MINIMUM SENTENCE UNDER TITLE 21 U.S.C. § 841(b)(1)(A) 25

Conclusion 30

TABLE OF CONTENTS – Continued

Page

Appendix

Appendix A: United States v. Steven Curtis McIntosh, 236 F.3d 968 (8th Cir. 2001) A-1

Appendix B: Judgment in a Criminal Case B-1

TABLE OF AUTHORITIES

Page

CASES

Apprendi v. New Jersey, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000) 26, 27, 28, 30

Duncan v. Louisiana, 391 U.S. 145, 88 S. Ct. 1444, 20 L. Ed. 2d 491 (1968) 29

Jones v. United States, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999) 28, 29

McMillan v. Pennsylvania, 477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986) 26, 30

Mullaney v. Wilber, 421 U.S. 684, 95 S. Ct. 1881, 44 L. Ed. 2d 508 (1975) 28

Patterson v. New York, 432 U.S. 197, 97 S. Ct. 2319, 53 L. Ed. 2d 281 (1977) 28

People v. Gentry, 738 P.2d 1188 (Colo. 1987) 23

Pinkerton v. United States, 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946) 8, 10, 15, 16

United States v. Irvin, 2 F.3d 72 (4th Cir. 1993) 10, 21

United States v. Jones, 965 F.2d 1507 (8th Cir. 1992) 11, 21

United States v. Lanni, 970 F.2d 1092 (2nd Cir. 1992) 9

United States v. Martinez, 987 F.2d 902 (2nd Cir. 1993) 10, 11

United States v. McAllister, 225 F.3d 982 (8th Cir. 2000) 20

United States v. McIntosh, 236 F.3d 968 (8th Cir. 2001) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

United States v. Neadle, 72 F.3d 1104 (3rd Cir. 1996) 21

United States v. Patterson, 38 F.3d 139 (4th Cir. 1994) 11, 12, 13, 14, 19, 23

United States v. Robinson, 167 F.3d 824 (3rd Cir. 1999) 7, 13, 14, 19, 23

United States v. Ryan, 9 F.3d 660 (8th Cir. 1994) 20

United States v. Swiney, 203 F.3d 397 (6th Cir. 2000) ..... *passim*

United States v. S.A., 129 F.3d 995 (8th Cir. 1997) 20

United States v. Thunder Hawk, 127 F.3d 705 (8th Cir. 1997) 20

Walton v. Arizona, 497 U.S. 639, 110 S. Ct. 3047, 111 L. Ed. 2d 511 (1990) 29

OTHER AUTHORITIES

U.S. Const. amend. V 1, 25

U.S. Const. amend. VI 2, 25

18 U.S.C. § 3231 4

18 U.S.C. § 3742(a) 4

18 U.S.C. § 2 11

21 U.S.C. § 841(a)(1) 11

21 U.S.C. § 841(b) 10

21 U.S.C. § 841(b)(1)(A) ..... *passim*

21 U.S.C. § 841(b)(1)(C) ..... *passim*

21 U.S.C. § 846 ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

U.S.S.G. § 1B1.3 11

U.S.S.G. § 1B1.3(a)(1)(A) 3, 12

U.S.S.G. § 1B1.3(a)(1)(B) ..... *passim*

U.S.S.G. § 2D1.1 20

U.S.S.G. § 2D1.1(a) 9, 20

U.S.S.G. § 2D1.1(a)(2) 20, 22

OPINIONS BELOW

On December 20, 1999, the United States District Court for the Southern District of Iowa, the Honorable Ronald E. Longstaff, filed its Judgment in a Criminal Case. (Appendix B).

On January 10, 2001, in *United States of America v. Steven Curtis McIntosh*, 236 F.3d 968 (8th Cir. 2001), the United States Court of Appeals for the Eighth Circuit affirmed Petitioner's sentence. (Appendix A).

JURISDICTION

On January 10, 2001, the United States Court of Appeals for the Eighth Circuit affirmed Petitioner's sentence in *United States of America v. Steven Curtis McIntosh*, 236 F.3d 968 (8th Cir. 2001). (Appendix A). This Court's jurisdiction is invoked pursuant to Title 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND UNITED STATES SENTENCING GUIDELINES INVOLVED

Fifth Amendment, Constitution of the United States:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy

of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Sixth Amendment, Constitution of the United States:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Title 21 U.S.C. § 841(b)(1)(A):

(b) Penalties

Except as otherwise provided in section 859, 860, or 861 of this title, any person who violates subsection (a) of this section shall be sentenced as follows:

(1)(A) In the case of a violation of subsection (a) of this section involving –

* * *

(viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of Title 18, or $4,000,000 if the defendant is an individual or $10,000,000 if the defendant is other than an individual, or both. . . .

Title 21 U.S.C. § 1B1.3 Relevant Conduct (Factors that Determine the Guideline Range):

(a) Chapters Two (Offense Conduct) and Three (Adjustments). Unless otherwise specified, (i) the base offense level where the guideline specified more than one base offense level, (ii) specific offense characteristics and (iii) cross references in Chapter Two, and (iv) adjustments in Chapter Three, shall be determined on the basis of the following:

(1)(A) all acts and omissions committed, aided, abetted, counseled, commanded, induced, procured, or willfully caused by the defendant; and

(B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,

that occurred during the commission of the offense of conviction, in the preparation for that offense, or in the course of attempting to avoid detection or responsibility for the offense;

(2) solely with respect to offenses of a character for which § 3D1.2(d) would require grouping of multiple counts, all acts and omissions described in subdivision (1)(A) and (1)(B) above that were part of the same course of conduct or common scheme or plan as the offense of conviction;

(3) all harm that resulted from the acts and omissions specified in subsections (a)(1) and (a)(2) above, and all harm that was the object of such acts and omissions; and

(4) any other information specified in the applicable guideline.

STATEMENT OF THE CASE

The jurisdiction of the United States District Court for the Southern District of Iowa was pursuant to Title 18 U.S.C. § 3231. The jurisdiction of the United States Court of Appeals for the Eighth Circuit was invoked pursuant to Title 18 U.S.C. § 3742(a).

A grand jury returned a seven-count, superseding indictment against Petitioner, Lenora ("Jean") Creswell, John McMillian, and Amy Creswell. The charges related to the September 12, 1998, death of Jessica Smith, Jean's fourteen-year-old daughter, from a methamphetamine overdose.

This proceeding originated following the death of Jessica Smith (hereinafter Jessica) on September 13, 1998. Jessica was the fourteen-year-old daughter of Jean Creswell and the cousin of Amy Creswell. In approximately June of 1998, Jean Creswell and Jessica moved into

Petitioner's residence. During the summer of 1998, Jessica began living primarily with Amy Creswell. During August and September of 1998, both Jean Creswell and Amy Creswell provided Jessica with methamphetamine.

Petitioner manufactured methamphetamine with McMillian from approximately March of 1998 until their relationship terminated in mid-August of 1998. At that point, Petitioner virtually stopped manufacturing methamphetamine. Petitioner, McMillian and Jean Creswell shared their methamphetamine with others, including Amy Creswell, Jean's 21-year-old niece. Amy often used methamphetamine with Jean, but was also close to Jessica and spent a considerable amount of time with her. Petitioner did not provide Amy Creswell with any methamphetamine after mid-August of 1998 and provided minimal to no methamphetamine to Jean Creswell.

Jean and Amy frequently provided methamphetamine to Jessica, as did McMillian on a few occasions. Petitioner was unaware that the three were giving methamphetamine to Jessica. Petitioner never provided Jessica with methamphetamine and informed people that he did not want Jessica to be involved with methamphetamine and that Jessica was not to know that he and McMillian manufactured the drug. Petitioner never knew that Jessica was using methamphetamine.

On the afternoon of September 12, 1998, Amy and Jessica ingested methamphetamine together. Amy had been given a coffee filter, used in the manufacturing process that contained residue methamphetamine. Amy and Jessica soaked the filter in a glass of Diet Coke and then split the concoction between them. Later, as

McMillan, Amy, and Jessica were driving in a car, Jessica became unresponsive. McMillan and Amy took Jessica to McMillan's home and later to the hospital where she died the next morning. In a search of Petitioner's home later in the day, officers located items necessary to manufacture methamphetamine and further investigation ensued, resulting in the superseding indictment.

Pursuant to a plea agreement, Petitioner pleaded guilty to a charge that he conspired with Jean and McMillan to manufacture methamphetamine. Petitioner stipulated in his plea agreement that he was responsible for at least 500 grams of a mixture or substance containing methamphetamine, subjecting him to penalties for manufacturing a controlled substance identified in 21 U.S.C. § 841(b)(1)(A) (1994 & Supp. IV 1998). *See* 21 U.S.C. § 846 (providing that a conspirator is subject to the penalties proscribed for the substantive offense underlying the conspiracy). Section 841(b)(1)(A) requires a "term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall not be less than 20 years or more than life." The plea agreement left open for the district court's determination at sentencing whether Petitioner was subject to an enhanced sentence because of Jessica's death.

The district court held a sentencing hearing December 20, 1999. After hearing the evidence, the district court concluded that the Government failed to prove Petitioner directly furnished Jessica with methamphetamine or that he had any knowledge she was being supplied with the drug by others. Regardless, the court made three essential factual findings: 1) Jessica's death resulted from the use

of methamphetamine; 2) the methamphetamine used by Jessica September 12, 1998, came from either Amy Creswell, Jean Creswell, or McMillan; and 3) regardless of which of the three supplied the methamphetamine, it "originally came" from Petitioner. Despite the fact that Petitioner did not supply the drug directly to Jessica, the district court concluded Petitioner was subject to the enhancement because he played a role in manufacturing the drug she did use. The court sentenced Petitioner to the statutory 20-year minimum sentence.

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

I. PETITIONER'S SENTENCE WAS ERRONEOUSLY ENHANCED WHEN THE SENTENCING COURT FAILED TO REQUIRE A FINDING OF REASONABLE FORESEEABILITY AS DIRECTED BY 21 U.S.C. § 846 AND U.S.S.G. § 1B1.3(a)(1)(B) IN ORDER TO ENHANCE PETITIONER'S SENTENCE UNDER 21 U.S.C. § 841(b)(1)(A).

A. Split Between the Circuits Concerning Reasonable Foreseeability Principles.

A split exists between the circuits concerning the applicability of conspiracy principles as found in the United States Sentencing Guidelines to enhance the sentence of a defendant convicted under 21 U.S.C. § 846 and subject him to the penalty for a resultant death in 21 U.S.C. § 841(b)(1)(A). This split specifically involves the Sixth Circuit's decision in *United States v. Swiney*, 203 F.3d 397, 405 (6th Cir. 2000), the Third Circuit's decision in *United States v. Robinson*, 167 F.3d 824 (3rd Cir. 1999), and

the Eighth Circuit's ruling in the case specifically before this Court, *United States v. McIntosh*, 236 F.3d 968 (8th Cir. 2001). At issue is whether principles of causation or foreseeability, required to sentence a defendant for conspiracy under the United States Sentencing Guidelines, are applicable to determine whether a defendant convicted under 21 U.S.C. § 846 is subjected to the sentencing enhancement in 21 U.S.C. § 841(b)(1)(A).

In *Swiney*, the Sixth Circuit held that the *Pinkerton* principles, as articulated in the relevant conduct guideline, U.S.S.G. § 1B1.3(a)(1)(B), determine whether a defendant convicted under 21 U.S.C. § 846 is subject to the penalty set forth in 21 U.S.C. § 841(b)(1)(C) when death results. *See Pinkerton v. United States*, 328 U.S. 640, 66 S. Ct. 1180 (1946). In *Swiney*, twelve co-defendants were charged with conspiracy to distribute heroin in which Michael Isaac, the leader of the conspiracy, arranged for members of the conspiracy to travel to Philadelphia to purchase heroin for resale in Mountain City, Tennessee. Defendant Johnny Isaac, a distributor of the heroin, sold to Kristopher Phillips, whose death resulted from heroin sold to him by Johnny Isaac. *Swiney*, 203 F.3d at 400. Nine of twelve co-defendants pled guilty to conspiracy to possessing heroin with intent to distribute in violation of 21 U.S.C. § 846. The district court held Johnny Isaac responsible for Phillip's death and imposed the heightened sentence but refused to heighten the base offense level for any other defendants. *Id.* at 401. The Government appealed seven of the defendants' sentences and cross-appealed two other defendants' sentences (Defendants

Mullin and Swiney) on the ground that all nine defendants should have received a statutory mandatory minimum of twenty years pursuant to 21 U.S.C. § 841(b)(1)(C) and U.S.S.G. § 2D1.1(a).[1]

The *Swiney* Court undertook a lengthy analysis of the Sentencing Guidelines' treatment of conspiracy. Under the Sentencing Guidelines, "a defendant is accountable for the conduct of other conspirators only if that conduct was (1) reasonably foreseeable to him and (2) in furtherance of the jointly undertaken criminal activity." *Id.* at 402. *See* U.S.S.G. § 1B1.3(a)(1)(B). The Sentencing Guidelines standard is significantly more narrow than the criminal law standard for conviction of conspiracy where the defendant may be convicted of conspiracy even though he is unaware of the conspiracy's unlawful aims as long as he has knowledge of some of those aims. *Id.* at 403 (quoting *United States v. Lanni*, 970 F.2d 1092, 1093 (2nd Cir. 1992)). Thus, the relevant conduct considered in construing the guideline sentencing range may not be the same for each defendant in the conspiracy. *Id.* at 404 (citations omitted).

In determining the sentencing range for a conspiracy conviction under 21 U.S.C. § 846 and 21 U.S.C. § 841(b)(1)(C), the *Swiney* Court determined the "reasonable foreseeability" analysis in the Sentencing Guidelines must be applied. *Swiney*, 203 F.3d at 405. The *Swiney* Court "found no difficulty in reconciling the mandatory minimum language" of 21 U.S.C. § 841(b)(1)(C) with the

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[1] The language for the sentencing enhancements under § 841(b)(1)(A) and § 841(b)(1)(C) is identical.

foreseeability analysis of U.S.S.G. § 1B1.3(a)(1)(B). *Swiney* cited support from a number of circuits which applied the foreseeability analysis of the relevant conduct provision to the calculation of drug quantities for the purpose of mandatory minimum sentences under 21 U.S.C. §§ 841(b) and 846. *Id.* at 405-06.

Swiney adhered to the *Pinkerton* theory of liability to determine whether a defendant is subject to the sentence enhancement for a resultant death under section 841(b)(1)(C). Although an individual can be convicted of participation in a conspiracy, he should not be sentenced for certain conspiratorial acts unless there is proof that he "knew or should have known about the details of these conspiratorial acts." *Id.*; *United States v. Martinez*, 987 F.2d 902, 925-26 (2nd Cir. 1993). *Swiney* held that the *Pinkerton* principles, as articulated in U.S.S.G. § 1B1.3(a)(1)(B), determine whether a defendant convicted under 21 U.S.C. § 846 is subject to the penalty enhancement set forth in 21 U.S.C. § 841(b)(1)(C). *See United States v. Irvin*, 2 F.3d 72 (4th Cir. 1993) (taking recognition that the sentencing guidelines were created pursuant to the Sentencing Reform Act of 1984, and that the individual guidelines, including the reasonable foreseeability test as set forth in the relevant conduct section, have been accepted by Congress. Thus, two distinct congressionally approved sentencing schemes, the mandatory minimum approach and the Sentencing Guidelines, are presently in place. The two schemes should be reconciled to the extent legitimate and practical. Following a conviction for section 846, in arriving at the proper quantity of narcotics for purposes of section 841(b), *Pinkerton* principles, as detailed in the relevant conduct guideline, U.S.S.G.

§ 1B1.3, must apply to determine the quantity of narcotics reasonably foreseeable to an individual coconspirator); *Martinez*, 987 F.2d 902 (holding that the same "reasonable foreseeability" standard of the Guidelines must be applied to sentencing for conspiracy under 21 U.S.C. § 846; statute requiring mandatory minimum sentences for certain drug offenses requires reasonable foreseeability in order to hold conspirator accountable for acts of co-conspirator; such provision was not intended to overrule guidelines and require strict liability); *United States v. Jones*, 965 F.2d 1507, 1517 (8th Cir. 1992) (holding that the same standards govern district court's drug quantity determination for purpose of imposing mandatory minimum sentence for conspiracy to distribute that apply to sentencing guidelines: court must find by a preponderance of evidence the activities were (1) in furtherance of the conspiracy and (2) were known or reasonably foreseeable to the defendant).

Swiney, along with the instant case and the conflicting Third Circuit decision, is distinguishable from *United States v. Patterson*, 38 F.3d 139 (4th Cir. 1994), in which the Fourth Circuit analyzed the sentencing enhancement of section 841(b)(1)(C) in a non-conspiracy setting and determined the sentencing enhancement was applicable without regard for proximate cause concepts. In *Patterson*, one defendant pled guilty to unlawful distribution of a controlled substance, and the second defendant pled guilty to aiding and abetting in that offense in violation of 18 U.S.C. § 2 and 21 U.S.C. § 841(a)(1). The *Patterson* Court rejected the defendant's argument that the Government was required to prove that the death was the

intended or foreseeable result of their distribution under 21 U.S.C. § 841(b)(1)(C):

> Quite simply, the plain language of § 841(b)(1)(C) does not require, nor does it indicate, that prior to applying the enhanced sentence, the district court must find that death resulting from the use of a drug distributed by a defendant was a reasonably foreseeable event . . . . The statute puts drug dealers and users on clear notice that their sentence will be enhanced if people die from using the drugs they distribute. . . . Where serious bodily injury or death results from the distribution of certain drugs, Congress has elected to enhance a defendant's sentence regardless of whether the defendant knew or should have known that death will result. We will not second guess this unequivocal choice.

Patterson, 38 F.3d at 145.

Both the *Swiney* and *Patterson* Courts correctly point out that *Patterson* did not involve a drug conspiracy. The *Patterson* defendants were convicted of distributing and aiding and abetting as encompassed within U.S.S.G. § 1B1.3(a)(1)(A), which does not require a finding of reasonable foreseeability. *Swiney*, 203 F.3d at 405 (quoting *Patterson*, 38 F.3d at 145-46). *Patterson* points out that in a drug conspiracy case, "a defendant is deemed accountable for both the quantity of drugs he personally distributed and any quantities distributed by his coconspirators which are reasonably foreseeable to him." *Patterson*, 38 F.3d at 145-46. *Patterson* actually lends support for the requirement of a foreseeability analysis in a drug conspiracy case, such as the one at hand. *Patterson*'s remarks

concerning the sentencing enhancement in a non-conspiracy case are dicta in relation to this case. *See Swiney*, 203 F.3d at 405.

Swiney must be distinguished from the Third Circuit's decision in *United States v. Robinson*, 167 F.3d 824 (3rd Cir. 1999). In *Robinson*, the defendant was convicted under 21 U.S.C. § 841(b)(1)(C) of conspiring to distribute heroin and was sentenced to the twenty-year mandatory minimum for a resultant death. The defendant regularly sold to Bungar and Minchoff. Bungar purchased three packets of heroin from the defendant for Minchoff, and Bungar delivered these packets to Minchoff. At sentencing, the district court determined Minchoff and his girlfriend died from a heroin overdose in whole or in part from the heroin delivered by Bungar during the operation of the conspiracy. *Robinson*, 167 F.3d at 830.

Although *Robinson* involved a conspiracy, the *Robinson* Court followed *Patterson* and stated it would apply the "plain and unambiguous" language in the statute. *Id.* at 830-31. The *Robinson* Court rejected the defendant's argument that the district court must find that the defendant's conduct was the proximate cause of a death before imposing the sentencing enhancement. The *Robinson* Court stated:

> Congress recognized that the risk is inherent in the product and thus it provided that persons who distribute it do so at their own peril. It is obvious Congress intended in such a case that the 20-year mandatory minimum would apply if death or serious bodily injury resulted from the use of the substance without regard for common law proximate cause concepts.

Id. at 831.

In discussing the applicability of the U.S.S.G. § 1B1.3(a)(1)(B), the *Robinson* Court determined the Sentencing Guidelines had limited relevancy because the sentencing court imposed the statutory minimum sentence. *Id.* However, to the extent the reasonable foreseeability requirement of the sentencing guidelines is implicated, the requirement is satisfied as *Robinson* intended for the heroin to be distributed. *Id.*

The *Robinson* and *Swiney* Courts have marked differences in their determination of the relevancy foreseeability principles and those principles articulated in the sentencing guidelines as related to a conspiracy conviction under 21 U.S.C. § 846 and the sentence enhancement of 21 U.S.C. § 841(b)(1)(A). The difference demonstrates a split between the two circuits. The Eighth Circuit adopted the reasoning in *Robinson*. However, *Robinson* improperly relied on the reasoning in *Patterson*, which had limited relevancy because no conspiracy existed. As the reasoning in *Swiney* is the proper reasoning to determine the applicability of the sentencing enhancement for a resultant death following a conspiracy conviction, the *McIntosh* Court was misplaced in adopting the reasoning set forth in *Robinson*.

1. Eighth Circuit Application.

In *United States v. McIntosh*, 236 F.3d 968 (8th Cir. 2001), the Eighth Circuit determined *Swiney* was inapplicable because *Swiney* dealt with the situation in which the Government sought to vicariously enhance a defendant's sentence based solely on the actions of a co-conspirator or co-conspirators. *McIntosh*, 236 F.3d at 973. The *McIntosh*

Court determined *Swiney*'s reasoning applied only in those cases where a conspiracy defendant played no direct part in manufacturing the drug or immediately distributing the drug that caused the death or serious bodily injury. *Id.*

The Eighth Circuit's reasoning was misplaced. *Swiney* held that before a defendant convicted under 21 U.S.C. § 846 can be subject to the sentence enhancement of 21 U.S.C. § 841(b)(1)(C) for a resultant death, the sentencing court must find that he or she is part of the distribution chain that led to the victim's death. *Swiney*, 203 F.3d at 406. *Pinkerton* principles, as articulated in the relevant conduct guideline, are utilized to determine whether a defendant convicted under 21 U.S.C. § 846 is subject to the penalty set forth in 21 U.S.C. § 841(b)(1)(C). *Id.* at 405. The reasoning in *Swiney* applies to all members of the conspiracy.

Contrary to the Eighth Circuit's reasoning, *Swiney* does not differentiate its application between those members of the conspiracy who played a "direct role" in manufacturing or distributing the drug from those who did not have a direct role. Rather, all members of the conspiracy are subject to the same criteria. For a defendant convicted of conspiracy under 21 U.S.C. § 846, *Swiney* requires the sentencing court to utilize *Pinkerton* principles, as delineated in U.S.S.G. § 1B1.3(a)(1)(B), to determine whether a defendant is subject to the penalty enhancement set forth in 21 U.S.C. § 841(b)(1)(C).

The *McIntosh* Court determined *Swiney*'s reasoning applicable only to those cases in which a conspiracy defendant played no direct part in manufacturing the

drug or in immediately distributing the drug that caused death or serious bodily injury. *McIntosh*, 236 F.3d at 974. However, the facts and holding of *Swiney* are to the contrary. *Swiney* involved twelve conspiracy members in which the conspiracy leader (Michael Isaacs) arranged for certain conspiracy members to travel to Philadelphia, Pennsylvania, to purchase heroin from other co-conspirators. Michael Isaacs would then give the heroin to the co-conspirator distributors, who gave the drug to the co-conspirator deliverer (Johnny Isaacs). It was Johnny Isaacs who delivered the heroin which killed the victim (Phillips). At sentencing, Johnny Isaacs was sentenced to the enhancement for a resultant death under section 841(b)(1)(C), although his role in the conspiracy and resultant death was arguably no more direct or significant than that of other conspiracy members. In regard to all other conspiracy members on appeal, the *Swiney* Court determined *Pinkerton*'s reasonable foreseeability analysis as set out in the relevant conduct guidelines must be utilized to determine the applicability of the sentencing enhancement. Contrary to the assertions of the *McIntosh* Court, the *Swiney* Court did not distinguish as to whom the foreseeability analysis applied, but subjected each co-conspirator to the foreseeability analysis detailed in the sentencing guidelines.

Significantly, the *McIntosh* Court determined *Swiney* inapplicable to their analysis as Petitioner was subject to the enhancement based upon his "direct role" in manufacturing the drug ingested by Jessica. *Id.* at 974. The *McIntosh* Court essentially characterized the conspirators in *Swiney* who did not directly deliver the drug to the

victim as not playing a "direct role" in manufacturing or distributing the drug that caused the victim's death. *Id.*

Petitioner can only be compared to those individuals in *Swiney* whom the *McIntosh* Court stated played no "direct role" in manufacturing or immediately distributing the drug. Petitioner had no knowledge methamphetamine was being delivered to Jessica. The deliverers of the drugs to Jessica (Lenora Creswell and Amy Creswell), who had the "direct role" in the distribution of methamphetamine to Jessica, were not charged with the sentencing enhancement. Petitioner can only be compared to the individuals in *Swiney* who were far up the distribution chain and successfully appealed the applicability of the sentencing enhancement because it was not reasonably foreseeable their actions resulted in the victim's death. As Petitioner was far up the distribution chain of the events leading to Jessica's death, his participation cannot be considered direct. The Eighth Circuit's determination that Petitioner's participation was direct is contrary to their own comparison of "direct" participation which occurred in *Swiney*.

The Eighth Circuit determined Petitioner's role in the death of Jessica through strict liability principles. The Eighth Circuit failed to determine whether Petitioner would be subject to the enhancement following the application of reasonable foreseeability principles articulated in U.S.S.G. § 1B1.3(a)(1)(B). However, an analysis of the facts presented at sentencing do not demonstrate that Jessica's death was reasonably foreseeable or attributable to Petitioner.

Importantly, the Eighth Circuit accepted the district court's findings that the Government failed to prove that Petitioner directly furnished Jessica with methamphetamine or that Petitioner had any knowledge Jessica was being supplied with the drug by others. *Id.* at 971. Because Petitioner did not directly furnish methamphetamine to Jessica, the reasonable foreseeability analysis as defined in U.S.S.G. § 1B1.3(a)(1)(B) and articulated in *Swiney* is particularly relevant. Following such reasoning, Petitioner's sentence cannot be enhanced without a determination that the conduct which caused Jessica's death was (1) reasonably foreseeable to Petitioner and (2) in furtherance of the jointly undertaken criminal activity. *Swiney*, 203 F.3d at 402. If Petitioner's conduct did not satisfy these requirements, he cannot be subjected to the enhancement.

The Eighth Circuit failed to apply this criteria. The Eighth Circuit's reasoning is faulty as it follows *Robinson*'s analysis, which erroneously relied upon *Patterson* which did not involve a conspiracy. As Petitioner was convicted of conspiracy, the Eighth Circuit should have applied reasonable foreseeability principles as articulated in the sentencing guidelines. Failure to do so constitutes error and Petitioner's sentence should be reversed.

B. Causation Requirement of 21 U.S.C. § 841(b)(1)(A).

In *United States v. McIntosh*, 236 F.3d 968 (8th Cir. 2001), the Eighth Circuit was presented with a case of first impression to determine the requirements to impose

a twenty-year mandatory minimum sentence for a resultant death under 21 U.S.C. § 841(b)(1)(A). The Eighth Circuit determined strict liability principles were applicable and a causation analysis was not required. *Id.* at 973. However, in connection with the foreseeability principles discussed above, to invoke the sentence enhancement for a resultant death, the Government should be required to prove Jessica's death was caused by Petitioner's conduct. As the Government failed to prove a sufficient nexus between Petitioner's conduct and Jessica's death, the twenty-year mandatory minimum sentence cannot be imposed.

The Eighth Circuit determined the language of 21 U.S.C. § 841(b)(1)(A) is unambiguous, and the plain meaning of the statute prohibited the Court from superimposing a foreseeability or proximate cause requirement. *Id.* at 972. The *McIntosh* Court relied upon the decisions of the Fourth and Third Circuits to determine the plain meaning of the statute requires strict liability. *See United States v. Patterson*, 38 F.3d 139 (4th Cir. 1994); *United States v. Robinson*, 167 F.3d 824, 831 (3rd Cir. 1999). The *McIntosh* Court failed to specify how the plain reading of the statute requires strict liability and failed to cite to any legislative authority demanding a strict liability reading of the statute. In essence, the plain reading of the statute can easily lead to a determination that causation is a requirement to the enhancement. Further, the *McIntosh* Court actually extended the holdings of *Patterson* and *Robinson* to determine 21 U.S.C. § 841(b)(1)(A) is a strict liability statute. Such an extension is unwarranted.

To determine the existence of a causation requirement in section 841(b)(1)(A) and the similar language of

U.S.S.G. § 2D1.1, the intent of the statute should be first derived from the plain language and structure of the statute. *United States v. Ryan*, 9 F.3d 660, 667 (8th Cir. 1994). If the statute's language is plain, the inquiry should end and the statute should be enforced according to its terms. *United States v. Thunder Hawk*, 127 F.3d 705, 707-08 (8th Cir. 1997). However, "when the meaning of the statute is questionable, it should be given a sensible construction and construed to effectuate the underlying purposes of the law." *United States v. McAllister*, 225 F.3d 982, 986 (8th Cir. 2000) (quoting *United States v. S.A.*, 129 F.3d 995, 998 (8th Cir. 1997)).

Section 841(b)(1)(A) provides, in relevant part:

> In the case of a violation of subsection (a) of this section involving . . . such person shall be sentenced to a term of imprisonment which may not be less than ten years or more than life and if death or serious bodily injury *results from* the use of such substance shall not be less than 20 years or more than life.

21 U.S.C. § 841(b)(1)(A) (emphasis added). Additionally, U.S.S.G. § 2D1.1(a)(2) provides for an offense level "38, if the defendant is convicted under 21 U.S.C. § 841(b)(1)(A), . . . , and the offense of conviction establishes that death or serious bodily injury *resulted from* the use of the substance." U.S.S.G. § 2D1.1(a)(2) (emphasis added). Based upon the plain language and structure of the statute, and with the support discussed below, this Court should hold that 21 U.S.C. § 841(b)(1)(A) and U.S.S.G. § 2D1.1(a) require the Government to prove that Petitioner's conduct was the proximate cause of Jessica's death.

Support that the term "resulted from" demands causation is contained in the United States Sentencing Guidelines. For example, U.S.S.G. § 1B1.3, a default rule concerning the conduct and harm to factor in considering specific offense characteristics unless specified by another provision in the guidelines, requires consideration of all harm that "resulted from" the acts and omissions specified within subsections (a)(1) and (a)(2). U.S.S.G. § 1B1.3(a)(3). Webster's Third New International Dictionary defines the verb "result" as follows: "to proceed, spring, or arise as a consequence, effect, or conclusion." *United States v. Neadle*, 72 F.3d 1104, 1113, n.5 (Harris, J., concurring and dissenting) (citing Webster's Third New International Dictionary of the English Language 1937 (Philip Babcock Gove ed., 1966)). Therefore, for harm to "result from" a defendant's conduct, it must "arise as a consequence" from such conduct. This necessarily requires causation.

Further support is contained in U.S.S.G. § 1B1.3(a)(1)(B). The base offense level and adjustments in a conspiracy requires determination of "all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity." U.S.S.G. § 1B1.3(a)(1)(B); *See Irvin*, 2 F.3d at 78 (holding that sentencing court must determine quantities reasonably foreseeable to each defendant prior to determining application of mandatory minimum sentencing provisions); *cf. Jones*, 965 F.2d 1507 (holding that the standards for determining quantity under the sentencing guidelines apply to determining quantity under 841(b) and 846). Section 1B1.3(a)(1)(B) requires the sentencing court in a conspiracy to determine which acts were caused by

which actor. Similarly, because Petitioner pled to conspiracy charges, the sentencing court was required to determine whether Jessica's death was caused by Petitioner or the reasonably foreseeable result of his actions. Failure to consider the causation requirement warrants reversal.

The support cited above demands that a determination of causation be made pursuant to 21 U.S.C. § 841(b)(1)(A) and U.S.S.G. § 2D1.1(a)(2) prior to imposing a twenty-year mandatory minimum sentence. To impose the twenty-year mandatory minimum, Jessica's death must have been caused by Petitioner or been the reasonably foreseeable result of his actions. The sentencing court determined that Petitioner did not directly furnish Jessica drugs and had no knowledge drugs were being used by Jessica. The sentencing court's determination requires a conclusion that Petitioner did not cause Jessica's death. Therefore, the decision of the sentencing court must be reversed.

The Eighth Circuit should have interpreted 12 U.S.C. § 841(b)(1)(A) to require traditional proximate cause concepts. However, even if traditional proximate cause concepts are not required by the language of the statute, elements of causation are still required. In this case, it was not foreseeable that Petitioner's conduct of manufacturing methamphetamine would have resulted in Jessica's death. Petitioner's connection with Jessica's death is too remote, and the twenty-year mandatory minimum cannot apply. As such, the decision of the Eighth Circuit and the sentencing judge was in error.

C. An Intervening Cause Relieves Petitioner of Liability.

A cause intervened between Petitioner's actions and Jessica's death that relieved him of liability. Unlawful conduct which is broken by an independent intervening cause cannot be the proximate cause of the death of another. *See People v. Gentry*, 738 P.2d 1188 (Co. 1987). An intervening or superseding cause will relieve the original actor of liability for his wrongdoing because the intervening act is the immediate act and the original wrongful act is no longer the proximate cause. Black's Law Dictionary 736 (5th ed. 1979). The intervening cause intervenes between the original wrongful act or omission and the injury. *Id.*

The issue of an intervening cause arose in *Patterson*, wherein the defendant was convicted under 21 U.S.C. § 841(b)(1)(C) and sentenced to the twenty-year mandatory minimum for a resultant death. Although the Court determined that section 841(b)(1)(C) does not contain a reasonable foreseeability requirement, they left open whether an intervening or supervening cause exception existed because the record did not support the argument. *Patterson*, 38 F.3d at 146; *accord Robinson*, 167 F.3d at 830.

Petitioner's case is distinguishable from *Patterson*, wherein the defendant argued that the intervening cause was the deceased's ingestion of mederperine, her drug addiction, and suicidal tendencies. *Patterson*, 38 F.3d at 146. These possible causes of death were all foreseeable and not intervening. Petitioner, however, appropriately points to an independent cause which intervened following his actions and prevented his conduct from being the

proximate cause. As such, the mandatory sentence cannot be imposed.

The events surrounding Jessica's death demonstrate that her death resulted from an intervening cause rather than from Petitioner's conduct. First, Petitioner virtually quit manufacturing when he terminated his relationship with McMillian on approximately August 14, 1998. After August 14, 1998, McIntosh provided no methamphetamine to Amy Creswell or Jean Creswell, which required these women to receive methamphetamine from alternative sources. McMillian, however, manufactured methamphetamine on his own following his break-up with Petitioner, and continued to provide methamphetamine to Amy Creswell during August and September 1998.

From mid-August 1998, Amy Creswell and Jean Creswell were receiving methamphetamine from sources other than Petitioner. As Jessica received her methamphetamine from these two women, the methamphetamine Jessica was receiving also derived from sources other than Petitioner. The alternative sources of methamphetamine was an intervening cause which became the immediate cause for Jessica's death. The intervening cause relieves Petitioner of liability, as he is not the proximate cause of Jessica's death. As such, the sentencing decision should be reversed and remanded to consider the intervening cause.

II. PETITIONER WAS DENIED DUE PROCESS, AND NOTICE AND TRIAL GUARANTEES, WHEN THE DISTRICT COURT EMPLOYED A MERE PREPONDERANCE OF THE EVIDENCE STANDARD TO DETERMINE WHETHER DEATH RESULTED FROM THE USE OF DRUGS FOR WHICH *PETITIONER* WAS RESPONSIBLE AND, BASED ON THAT FINDING, INCREASED PETITIONER'S MANDATORY MINIMUM SENTENCE UNDER TITLE 21 U.S.C. § 841(b)(1)(A).

The district court's determination, by a preponderance of the evidence, that Petitioner played a role in the manufacturing of the drugs which caused Jessica's death, subjected Petitioner to the twenty-year mandatory minimum sentence imposed under section 841(b)(1)(A) where death results. The range of sentencing available in Petitioner's case was thereby enhanced from ten years to life, the minimum otherwise, to twenty years to life. The enhancement fact in this case – Petitioner's role in the manufacture of the drug that caused Jessica's death – thereby increased Petitioner's sentence by ten years. The fact that Petitioner was sentenced *at* the mandatory minimum of twenty years and not beyond, strongly suggests that, but for the district court's findings, Petitioner would in fact have been sentenced at or near ten years (the minimum without a death finding). Instead, Petitioner faces an additional ten years imprisonment based exclusively on a fact proven by no more than a preponderance. Failure of the district court to require proof of the enhancement fact in this case beyond a reasonable doubt violated Petitioner's due process protections under the Fifth Amendment of the Constitution of the United States and his notice and trial guarantees under the Sixth Amendment.

The Eighth Circuit, while denying Petitioner relief based on the district court's use of a preponderance of the evidence standard in enhancing his penalty where there was no increase in the statutory *maximum*, submits that the resulting increase in the statutorily-required *minimum* term from ten to twenty years might be found to run afoul of the protections recently recognized in *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000). *McIntosh*, 236 F.3d at 975. This Court in *Apprendi* required proof beyond a reasonable doubt of any fact, other than a prior conviction, before increasing a sentence beyond the statutory *maximum*. *Apprendi* touches also, albeit briefly, on mandatory *minimum* sentences in the context of its prior decision in *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986) (allowing the legislature to raise the minimum penalty associated with a crime based on non-jury factual findings, as long as the penalty is within the range specified for the crime for which the defendant was convicted by the jury), leaving for "another day" the determination of whether enhancement facts that increase mandatory minimum sentences, but that do not increase a statutory maximum sentence, must be alleged and proved:

> The principal dissent accuses us of today "overruling *McMillan*." We do not overrule *McMillan*. We limit its holding to cases that do not involve the imposition of a sentence more severe than the statutory maximum for the offense established by the jury's verdict – a limitation identified in the *McMillan* opinion itself. Conscious of the likelihood that legislative decisions may have been made in reliance on *McMillan*, we reserve for another day the question whether

> stare decisis considerations preclude reconsideration of its narrower holding.

Apprendi, 120 S. Ct. at 2361 n.13 (citations omitted).

Justice Thomas, in his concurrence in *Apprendi*, discusses application of the common-law rule requiring proof of an enhancement fact to situations involving mandatory minimum sentences:

> . . . I think it clear that the common-law rule would cover the *McMillan* situation of a mandatory minimum sentence (in that case, for visible possession of a firearm during the commission of certain crimes). No doubt a defendant could, under such a scheme, find himself sentenced to the same term to which he could have been sentenced absent the mandatory minimum. The range for his underlying crime could be 0 to 10 years, with the mandatory minimum of 5 years, and he could be sentenced to 7. (Of course, a similar scenario is possible with an increased maximum.) But it is equally true that his expected punishment has increased as a result of the narrowed range and that the prosecution is empowered, by invoking the mandatory minimum, to require the judge to impose a higher punishment than he might wish. The mandatory minimum "entitl[es] the Government," *Woodruff*, 68 F., at 538, to more than it would otherwise be entitled (5 to 10 years, rather than 0 to 10 and the risk of a sentence below 5). Thus, the fact triggering the mandatory minimum is part of "the punishment sought to be inflicted," Bishop, Criminal Procedure, at 50; it undoubtedly "enters into the punishment" so as to aggravate it, *id.*, T 540, at 330, and is an "ac[t] to which the law affixes punishment," *id.*, T 80, at 51. Further,

> just as in *Hobbs* and *Searcy*, see *supra*, at 2374-2375, it is likely that the change in the range available to the judge affects his choice of sentence. Finally, in numerous cases, such as *Lacy*, *Garcia*, and *Jones*, see *supra*, at 2370-2371, 2375, 2376, the aggravating fact raised the whole range – both the top and bottom. Those courts, in holding that such a fact was an element, did not bother with any distinction between changes in the maximum and the minimum. What mattered was simply the overall increase in the punishment provided by law. And in several cases, such as *Smith* and *Woodruff*, see *supra*, at 2369, 2376, the very concept of maximums and minimums had not applicability, yet the same rule for elements applied. See also *Harrington* (discussed *supra*, at 2377-2378).

Apprendi, 120 S. Ct. at 2379-80 (Thomas, Scalia, J.J. concurring).

Justice Stevens, in *Jones v. United States*, 526 U.S. 227, 119 S. Ct. 1215, 143 L. Ed. 2d 311 (1999), likewise indicates that facts used to establish mandatory minimum sentences should be submitted to the jury and proved beyond a reasonable doubt:

> . . . I am convinced that it is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established by proof beyond a reasonable doubt. That is the essence of the Court's holdings in *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970), *Mullaney v. Wilbur*, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975), and *Patterson v. New York*, 432 U.S. 197, 97 S.Ct.

> 2319, 53 L.Ed.2d 281 (1977). To permit anything less "with respect to a fact which the State deems so important that it must either be proved or presumed is impermissible under the Due Process Clause." *Id.*, at 215, 97 S.Ct. 2319. This principle was firmly embedded in our jurisprudence through centuries of common law decisions. *See, e.g., Winship*, 397 U.S., at 361-364, 90 S.Ct. 1068; *Duncan v. Louisiana*, 391 U.S. 145, 151-156, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968). Indeed, *a proper understanding of this principle encompasses facts that increase the minimum as well as the maximum permissible sentence*, and also facts that must be established before a defendant may be put to death. If *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S.Ct. 2411, 91 L.Ed.2d 67 (1986), and Part II of the Court's opinion in *Walton v. Arizona*, 497 U.S. 639, 647-649, 110 S.Ct. 3047, 111 L.Ed.2d 511 (1990), departed from that principle, as I think they did, see *McMillan*, 477 U.S., at 95-104, 106 S.Ct. 2411 (STEVENS, J., dissenting) and *Walton*, 497 U.S., at 709-714, 110 S.Ct. 3047 (STEVENS, J., dissenting), they should be reconsidered in due course.

Jones, 119 S. Ct. at 1228-29 (Stevens J. concurring) (emphasis added). Justice Scalia, in *Jones*, states, "it is unconstitutional to remove from the jury the assessment of facts that alter the congressionally prescribed range of penalties to which a criminal defendant is exposed." *Jones*, 119 S. Ct. at 1229 (Scalia J. concurring).

The Government threatened Petitioner with a range of punishment if he manufactured drugs and with punishment at the higher end of that range if, with those drugs, he caused a death. Procedural safeguards designed to protect Petitioner, the requirement of proof

beyond a reasonable doubt in particular, should apply equally during punishment for both acts. This Court's holding in *McMillan*, allowing facts that require imposition of a mandatory minimum sentence to be proven by a preponderance of the evidence, is inconsistent with *Apprendi* and should be reversed.

CONCLUSION

Mr. McIntosh, Petitioner, requests the Court grant writ of certiorari to resolve a conflict in the circuits and address a crucial issue of law explicitly left open by the Court in *Apprendi*.

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APPENDIX

(Sup. Ct. Rule 14.1(I))

Appendix A, *United States v. Steven Curtis McIntosh*, 236 F.3d 968 (8th Cir. 2001) A-1

Appendix B, Judgment in a Criminal Case B-1

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 00-1035

UNITED STATES of America, Appellee, v. Steven Curtis McINTOSH, Appellant.	* * * * * * * *	Appeal from the United States District Court for the Southern District of Iowa.

Submitted: Sept. 12, 2000.
Filed: Jan. 10, 2001.

Before HANSEN, HEANEY, and MORRIS SHEPPARD ARNOLD, Circuit Judges.

HANSEN, Circuit Judge.

Steven Curtis McIntosh pleaded guilty to a charge that he conspired to manufacture methamphetamine, in violation of 21 U.S.C. § 846 (1994). On December 20, 1999, the district court[1] sentenced McIntosh to twenty years in prison. McIntosh appeals his sentence, and we affirm.

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[1] The Honorable Ronald E. Longstaff, Chief Judge, United States District Court for the Southern District of Iowa.

I.

A grand jury returned a seven-count, superceding indictment against McIntosh, Lenora ("Jean") Cresswell, John McMillan, and Amy Cresswell. The charges stemmed from an investigation that ensued after the September 12, 1998, death of Jessica Smith, Jean's 14-year-old daughter. Jessica's death resulted from a methamphetamine overdose.

The facts underlying the indictment are truly tragic. In June or July 1998, Jean, her 12-year-old son, and Jessica moved in with McIntosh. Jean initially agreed that she would take care of McIntosh's home if he would supply her with methamphetamine; the two later became romantically involved. McIntosh was privy to a methamphetamine supply because he and McMillan had been manufacturing the drug together since February 1998. McMillan and McIntosh split the manufactured methamphetamine evenly, and after Jean moved in, McIntosh provided the drug to her out of his half. The three shared their methamphetamine with others, including Amy Cresswell, Jean's 21-year-old niece. Amy often used methamphetamine with Jean, but she was also close to Jessica and spent a considerable amount of time with her. Jean and Amy frequently provided methamphetamine to Jessica, as did McMillan on a few occasions. McIntosh was unaware that the three were giving methamphetamine to Jessica. He, in fact, made it known that Jessica was not to be involved with methamphetamine nor was she to know that he and McMillan were manufacturing the drug.

On the afternoon of September 12, 1998, Amy and Jessica ingested methamphetamine together. Amy had been given a coffee filter, previously used in the manufacturing process, that contained residue methamphetamine. She and Jessica soaked the filter in a glass of Diet Coke and then split the concoction between them. Jessica later became unresponsive as McMillan, Amy, and Jessica were driving in a car. McMillan and Amy took Jessica to McMillan's home and later to the hospital where she died early the next morning. A search of McIntosh's home was executed later in the day. Officers conducting the search located items necessary to manufacture methamphetamine and further investigation ensued, resulting in the charges filed in the superceding indictment.

Pursuant to a plea agreement, McIntosh pleaded guilty to a charge that he conspired with Jean and McMillan to manufacture methamphetamine. McIntosh stipulated in his plea agreement that he was responsible for at least 500 grams of a mixture or substance containing methamphetamine, subjecting him to the penalties for manufacturing a controlled substance identified in 21 U.S.C. § 841(b)(1)(A) (1994 & Supp. IV 1998). *See* 21 U.S.C. § 846 (providing that a conspirator is subject to the penalties proscribed for the substantive offense underlying the conspiracy). Section 841(b)(1)(A)(viii) requires a "term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall not be less than 20 years or more than life." The plea agreement left open for the district court's determination at sentencing whether McIntosh was subject to an enhanced sentence because of Jessica's death. (Plea Agreement, R. at 19, ¶ 10.)

The district court held a sentencing hearing on December 20, 1999, at which time the government offered evidence to show the enhancement to the mandatory minimum sentence was required pursuant to § 841(b)(1)(A). After hearing the evidence, the district court made three factual findings essential to the issue: 1) Jessica's death resulted from the use of methamphetamine; 2) the methamphetamine used by Jessica on September 12, 1998, came from either Amy Cresswell, Jean Cresswell, or McMillan;[2] and 3) regardless of which of the three supplied the methamphetamine, it "originally came" from McIntosh. The district court further found that the government failed to prove that McIntosh directly furnished Jessica with methamphetamine nor that he had any knowledge she was being supplied with the drug by the others. Despite the fact that he did not supply the drug directly to Jessica, the district court concluded McIntosh was subject to the enhancement because he played a part in manufacturing the drug she did use. The district court sentenced McIntosh to the statutory 20-year minimum sentence.[3]

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[2] Amy testified that McIntosh gave her the filter containing the methamphetamine residue that she and Jessica used in the Diet Coke but that she had also received filters from Jean and McMillan in the past. Amy also testified that Jessica may have used, unbeknownst to her, methamphetamine from a stash kept in Amy's home on the same day the two ingested the methamphetamine from the filter.

[3] The court arrived at a Sentencing Guidelines range of 240 to 262 months, based on a total offense level 37 and a criminal history category I. Although the sentencing range is 210 to 262 months at the relevant sentencing table intersection, the court determined that U.S.S.G. § 5G1.1(c)(2) imposed a 240-month

II.

McIntosh challenges his sentence on two grounds. He first contends the district court erroneously enhanced his sentence based on Jessica's death. On appeal, McIntosh asks that we interpret § 841(b)(1)(A) to permit imposition of the twenty-year mandatory minimum sentence only if a district court finds that death or serious bodily injury was a reasonably foreseeable result of, or was proximately caused by, a defendant's conduct. He argues the government failed to prove that Jessica's death was reasonably foreseeable, and therefore, the district court should not have enhanced his sentence.[4] McIntosh also contends his sentence was imposed in violation of the constitutional protections recently recognized by the Supreme Court in *Apprendi v. New Jersey*, 120 S.Ct. 2348 (2000).

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floor on McIntosh's range because of the applicable 20-year (240-month) statutory minimum sentence. The court computed the total offense level based on a base offense level 38 (required under U.S.S.G. § 2D1.1(a)(2) when death results from use of a controlled substance), increased 2 levels because Jessica was a vulnerable victim, less 3 levels for McIntosh's acceptance of responsibility. The enhancement language of U.S.S.G. § 2D1.1(a)(2) mirrors § 841(b)(1)(A)'s language.

[4] McIntosh urges us to interpret U.S.S.G. § 2D1.1(a) similarly. Although the Guideline provision has little relevance under the circumstances – the district court determined a guideline range but imposed the 20-year minimum statutory sentence – we fail to see how the provision could be interpreted differently than the statute; the language is identical.

A.

McIntosh's first argument presents us with a matter of statutory interpretation: whether § 841(b)(1)(A)'s language, read in this case in conjunction with § 846, requires a district court to find that death or serious bodily injury was reasonably foreseeable to a defendant before imposing the statutory enhancement. The starting point for ascertaining the intended meaning of any statute is the language of the statute itself. *See United States v. McAllister*, 225 F.3d 982, 986 (8th Cir. 2000) (quoting *United States v. S.A.*, 129 F.3d 995, 998 (8th Cir. 1997)). If the language is unambiguous, the statute should be enforced as written unless there is clear legislative intent to the contrary. *See id.* "Courts are obligated to refrain from embellishing statutes by inserting language that Congress has opted to omit." *Root v. New Liberty Hosp. Dist.*, 209 F.3d 1068, 1070 (8th Cir. 2000). In its review of the statutory language, the district court concluded that foreseeability was irrelevant to the enhancement inquiry and that its factual findings warranted an enhancement under § 841(b)(1)(A). We review the conclusions de novo. *See United States v. Brummels*, 15 F.3d 769, 771 (8th Cir. 1994) ("As to application of facts to the legal interpretation of [a criminal statute], the standard of review is de novo.").

We begin our analysis with the language of § 841(b)(1)(A) – the applicable penalty provision because McIntosh admitted responsibility for more than 500 grams of methamphetamine mixture. Under § 841(b)(1)(A), a "person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results

from the use of such substance shall be not less than 20 years or more than life." We hold that this language is unambiguous and that giving effect to its plain meaning prohibits us from superimposing upon the statute a foreseeability or proximate cause requirement. From the statute's language, it is clear Congress intended to expose a defendant to a more severe minimum sentence *whenever* death or serious injury is a consequence of the victim's use of a controlled substance that has been manufactured or distributed by that defendant. We decline to hinder Congress's will, apparent from the face of the statute, through a judicial pronouncement that the statute requires more than it says. *See Burlington N., Santa Fe Ry. Co. v. Lohman*, 193 F.3d 984, 985 (8th Cir. 1999) (recognizing that rules of statutory construction prohibit courts from supplying words that "would defeat the purpose of the statute"), *cert. denied*, 120 S.Ct. 1832 (2000).

Our reading of § 841(b)(1)(A) is consistent with decisions of both the Third and Fourth Circuits. The Fourth Circuit was the first to address the statutory enhancement for death or serious bodily injury. *See United States v. Patterson*, 38 F.3d 139 (4th Cir. 1994), *cert. denied*, 514 U.S. 1113 (1995). It, too, agreed that Congress's intent is clear from the plain language of the statute.

> Quite simply, the plain language of [the statute] does not require, nor does it indicate, that prior to applying the enhanced sentence, the district court must find that death resulting from the use of a drug distributed by a defendant was a reasonably foreseeable event. . . . [Instead,] [t]he statute puts drug dealers and users on clear notice that their sentences will be enhanced if

> people die from using the drugs they distribute. . . . Where serious bodily injury or death results from the distribution of certain drugs, Congress has elected to enhance a defendant's sentence regardless of whether the defendant knew or should have known that death would result. We will not second-guess this unequivocal choice.

Id. at 145 (footnote omitted). The Third Circuit followed *Patterson*, concluding that "Congress recognized that the risk is inherent in [a controlled substance] and thus it provided that persons who distribute it do so at their peril." *United States v. Robinson*, 167 F.3d 824, 831 (3d Cir. 1999); *see also United States v. Rebmann*, 226 F.3d 521, 525 (6th Cir. 2000) ("On its face, the statute is, in effect, a strict liability statute with respect to the injury or death of another arising out of the distribution of drugs. It is, of course, within the power of Congress to create a strict liability crime in some situations." (in dictum)).[5] We agree with these courts' recognition that Congress intended § 841(b)(1)(A)'s enhancement to apply without regard to the principles of proximate cause or the foreseeability of death or serious bodily injury.

The enhancement inquiry is not altered merely because McIntosh pleaded guilty to conspiracy to manufacture methamphetamine (rather than to a substantive violation of § 841 itself) nor because Jessica obtained the drug directly from someone other than McIntosh. Section 846 provides that a defendant convicted of conspiracy

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[5] *Robinson*, *Patterson*, and *Rebmann* all addressed enhancements for death or serious injury under § 841(b)(1)(C). The language in § 841(b)(1)(A) is identical.

"shall be subject to the same penalties as those prescribed for the [underlying] offense." In this case, the district court found that McIntosh played a direct part in manufacturing the drug ingested by Jessica.[6] The underlying offense holds those who manufacture a drug strictly liable when death results from the manufactured drug. Accordingly, the district court was not required to find that Jessica's death was reasonably foreseeable to McIntosh before enhancing his sentence. In sum, when a conspiracy defendant plays a direct role in manufacturing or distributing a drug that results in death, Congress's intent under § 846 is clear that the defendant is *strictly liable* under § 841(b)(1)(A)'s enhancement scheme.

We are not faced in this case with a situation in which the government seeks to vicariously enhance a defendant's sentence based solely on the actions of a

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[6] McIntosh challenges the district court's finding that he is responsible for the drug that resulted in Jessica's death. He asserts that he and McMillan had a falling-out in August 1998 (a month before Jessica's death) and ceased manufacturing methamphetamine together. He further asserts that McMillan "completed" the manufacturing process of the drug used by Jessica after the falling-out. In making its ruling, the district court accepted McIntosh's version of the facts, but found the drug was still attributable to him because he prepared, or helped prepare, the methamphetamine up to the point at which McMillan could complete it. There was also evidence presented that McMillan split the final batch with McIntosh after it was complete and that the manufacturing equipment belonged to the both of them. Based on this evidence, we conclude the district court's factual finding is supported by the record and did not amount to clear error. *See United States v. Robinson*, 217 F.3d 560, 565 (8th Cir.) (standard of review), *cert. denied*, 2000 WL 1529053 (Nov. 13, 2000).

coconspirator or coconspirators, *i.e.*, where a defendant has played no part in the underlying offense conduct to which the death or serious bodily injury can be attributed. The Sixth Circuit recently faced such a situation in *United States v. Swiney*, 203 F.3d 397 (6th Cir.), *cert. denied*, 120 S.Ct. 2678 (2000), a decision McIntosh urges us to adopt. In *Swiney*, the government appealed the sentences of nine defendants convicted of conspiracy to distribute heroin. It argued that under the *Pinkerton* doctrine, all were subject to the statutory enhancement because an individual died from an overdose of heroin purchased from a nondefendant member of the conspiracy.[7] *See id.* at 399. The *Swiney* court rejected the argument as contrary to the Sentencing Guidelines treatment of conspiracy, U.S.S.G. § 1B1.3(a)(1)(B) specifically.[8] *See id.* at 402. The court reasoned that U.S.S.G. § 1B1.3(a)(1)(B) prohibits consideration of a coconspirator's actions in sentencing a

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[7] Under the *Pinkerton* doctrine, "each member of a conspiracy may be held criminally liable for any substantive crime committed by a co-conspirator in the course and furtherance of the conspiracy, even though those members did not participate in or agree to the specific criminal act." *United States v. Golter*, 880 F.2d 91, 93 (8th Cir. 1989) (citing *Pinkerton v. United States*, 328 U.S. 640 (1946)).

[8] U.S.S.G. § 1B1.3(a)(1) identifies relevant conduct for which a defendant may be sentenced:

> (B) in the case of a jointly undertaken criminal activity (a criminal plan, scheme, endeavor, or enterprise undertaken by the defendant in concert with others, whether or not charged as a conspiracy), all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity.

defendant unless the coconspirator's actions were in furtherance of the conspiracy and were reasonably foreseeable by the defendant. *See id.* at 403 (quoting *United States v. Lanni*, 970 F.2d 1092, 1093 (2d Cir. 1992)). Relying on numerous circuit decisions that apply U.S.S.G. § 1B1.3(a)(1)(B) for purposes of determining whether drugs distributed by a coconspirator are attributable to a defendant under § 841(b)'s quantity-dependent sentencing scheme, *see, e.g., United States v. Jones*, 965 F.2d 1507, 1517 (8th Cir.), *cert. denied*, 506 U.S. 924 (1992), the court remanded the case to the district court to conduct the Guidelines' foreseeability analysis to ascertain whether the nine defendants were subject to the enhancement. *See id.* at 405-06.

We find *Swiney*'s reasoning applicable only in those cases in which a conspiracy defendant played no direct part in manufacturing the drug or in immediately distributing the drug that caused the death or serious bodily injury. If the government seeks to enhance a conspiracy defendant's sentence, as it did in *Swiney*, based solely on conduct of a coconspirator, a foreseeability analysis *may* be required in determining whether Congress intended, under § 846, that the defendant be held accountable for the conduct of a coconspirator. *See United States v. Martinez*, 987 F.2d 920, 924 (2d Cir. 1993) ("Section 846 does not subject the defendant to liability for any crimes committed by any other members of the conspiracy, regardless of the defendant's knowledge about those crimes. To allow [such an] interpretation would be to expand dangerously the scope of conspiratorial culpability."); *cf. Jones*, 965 F.2d at 1517 (holding that a conspiracy defendant may only be sentenced based on drug quantities

possessed and sold by coconspirators if their conduct was "(1) in furtherance of the conspiracy and (2) were either known to [the defendant] or were reasonably foreseeable to [him]"). This case, however, does not require us to decide whether we would adopt the Sixth Circuit's approach in *Swiney* if we were faced with analogous facts – McIntosh is subject to the enhancement based on his direct role in manufacturing the drug ingested by Jessica and is therefore strictly liable for her death. This case is not *Swiney*.

We turn briefly to two other nonmeritorious arguments raised by McIntosh. First, he asks us to recognize that an intervening cause of death or serious bodily injury resulting from a controlled substance forecloses application of the statutory enhancement. We decline to reach the issue because McIntosh presents no facts establishing an intervening cause of Jessica's death. *See Patterson*, 38 F.3d at 146 (refusing to reach the same question). He argues Jessica's death resulted from methamphetamine derived from a source other than the conspiracy. His argument flies in the face of the district court's fact-finding to the contrary. As we have already said, *see supra*, at 7 n.6, there was ample evidence to support the district court's fact-finding that the drug Jessica ingested originated with McIntosh. Second, McIntosh asks us to hold that the enhancement applies only if a defendant intended to cause death or knowingly risked death. Our conclusion that the statute imposes strict liability upon McIntosh for Jessica's death vitiates that argument.

B. *Apprendi*

We turn next to McIntosh's contention that his sentence was imposed in violation of *Apprendi*, an issue raised by McIntosh's counsel during oral argument. In *Apprendi*, the Supreme Court announced a newly-recognized, constitutional principle: "Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 120 S.Ct. at 2362-63. These constitutional protections are, according to the Court, afforded by the due process protections of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment. *See id.* at 2355 (discussing the principle as foreshadowed in *Jones v. United States*, 526 U.S. 227, 243 n.6 (1999)).[9] McIntosh argues, in light of *Apprendi*, that his sentence was improperly enhanced because the district court employed a preponderance of the evidence standard, rather than a reasonable doubt standard, in ascertaining whether Jessica's death resulted from the use of methamphetamine for which McIntosh was responsible.

Because McIntosh entered a plea of guilty, he waived his right to a jury determination on all issues related to

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[9] In *Jones*, the Supreme Court noted that any fact that increases the maximum statutory penalty must also be charged in the indictment. *See* 526 U.S. at 243 n.6. In *Apprendi*, the Court declined to reach the indictment question because the defendant did not assert that the indictment returned by the grand jury was constitutionally defective. *See* 120 S. Ct. at 2355-56 n.3. Because we conclude *Apprendi*'s protections are inapplicable, we find no reason to further address the indictment question left open by the Court.

his prosecution. *See United States v. Martinez-Cruz*, 186 F.3d 1102, 1104 (8th Cir. 1999) (guilty plea constitutes a waiver of the constitutional right to a jury trial). By leaving open the issue of Jessica's death for determination by the district court at sentencing, however, he may have been entitled to hold the government to its constitutionally-required reasonable doubt burden of proof on the question, *assuming Apprendi* applies. *See, e.g., Rebmann*, 226 F.3d at 524-25 (although plea of guilty waives the right to a jury trial, a defendant does not waive the right to have the sentencing court determine factual issues beyond a reasonable doubt). But that is an issue we need not and do not decide because we conclude that *Apprendi* is inapplicable on two independent and alternative grounds. First and foremost, an enhancement based on a finding of death or serious bodily injury does not increase the statutory maximum sentence authorized by Congress under § 841(b)(1)(A). Alternatively, the sentence McIntosh received did not exceed the maximum sentence authorized under § 841(b)(1)(C), the penalty provision for the "offense simpliciter."

When a defendant is subject to § 841(b)(1)(A)'s penalties because of the quantity of drug admitted by him, as is the case with McIntosh,[10] the maximum statutory term of

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[10] This court has previously held that a defendant cannot later challenge the applicability of a sentencing provision when he "voluntarily and explicitly" bargained for its application in his plea agreement and had full knowledge of the potential sentence he faced under the provision. *See United States v. Nguyen*, 46 F.3d 781, 783 (8th Cir. 1995); *United States v. Fritsch*, 891 F.2d 667, 668 (8th Cir. 1989); *see also United States v. Barrett*, 173 F.3d 682, 684 (8th Cir. 1999) (denying defendant's challenge

imprisonment authorized by Congress is life, regardless of whether death or serious injury results from use of the drug. *See* 21 U.S.C. § 841(b)(1)(A). Because the finding as to death does not increase the statutory maximum already authorized by Congress based on the admitted drug quantity, *Apprendi*'s protections are not implicated. *See United States v. Chavez*, No. 00-1404, 2000 WL 1556050, at *2 (8th Cir. Oct. 20, 2000) (*Apprendi* does not apply when the statutory maximum is life, regardless of the challenged finding); *United States v. Smith*, 223 F.3d 554, 565-66 (7th Cir. 2000) (*Apprendi* is inapplicable where defendants faced a life sentence irrespective of the challenged factual finding made by the sentencing court); *see also United States v. Aguayo-Delgado*, 220 F.3d 926, 933 (8th Cir. 2000) (stating that *Apprendi* applies only if the challenged, nonjury sentencing finding increases the maximum sentence beyond the statutory range authorized by the offense of conviction), *cert. denied*, 2000 WL 1634209 (U.S. Nov. 27, 2000) (No. 00-6746). The death finding McIntosh challenges only increases the statutorily-required minimum term of imprisonment from 10 to 20

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to drug quantity to which he stipulated in a plea agreement). Here, McIntosh clearly agreed in his plea agreement that he was to be sentenced under § 841(b) based on his responsibility for 500 grams or more of a mixture or substance containing methamphetamine and acknowledged that he faced a prison term of 10 years to life, with a mandatory minimum of 20 years if the district court found that Jessica's death resulted from methamphetamine attributable to him. The maximum sentence of life and the death-enhanced mandatory minimum were both explained to McIntosh at his arraignment. (Audio Tape: Arraignment held on Jan. 19, 1999, before Magistrate Judge Thomas J. Shields.)

years. Although the Supreme Court may, and likely will, revisit the issue, the Court was careful to note in *Apprendi* that a fact which increases a mandatory minimum sentence (but not beyond the authorized statutory maximum) remains a sentencing factor and may be found by the sentencing court by a preponderance of the evidence. *See Apprendi*, 120 S. Ct. at 2361 n.13 (reserving for "another day" whether the Court's prior holding in *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), runs afoul of the protections recognized in *Apprendi*); *see also Aguayo-Delgado*, 220 F.3d at 934 ("*McMillan* allows the legislature to raise the minimum penalty associated with a crime based on non-jury factual findings, as long as the penalty is within the range specified for the crime for which the defendant was convicted by the jury.").

As we indicated above, an alternative ground exists for our conclusion that *Apprendi* affords no further constitutional protections to which McIntosh was entitled. Congress has authorized a maximum sentence of 20 years imprisonment under § 841(b)(1)(C), the penalty provision for the "offense simpliciter" (that is, the offense in its simplest form with no enhancements of any kind) as our brethren refer to it in *Aguayo-Delgado*, 220 F.3d at 933. However, as in *Aguayo-Delgado*, the district court's finding in this case did not increase McIntosh's sentence beyond § 841(b)(1)(C)'s unenhanced ceiling, *see id.* at 934, hence, as in *Aguayo-Delgado*, *Apprendi*'s protections are not implicated.

III.

For the foregoing reasons, we affirm the judgment of the district court.

HEANEY, Circuit Judge, concurring separately.

I concur fully in Sections I and II.A. of the court's opinion, but I concur with respect to Section II.B. only on the alternate ground set forth in the last paragraph in that section of the opinion.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

UNITED STATES DISTRICT COURT

Southern District of Iowa

UNITED STATES OF AMERICA

v.

STEVEN CURTIS McINTOSH,

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)
CASE NUMBER: Cr. 99-6
Alfredo G. Parrish
Defendant's Attorney

THE DEFENDANT:

[XX] pleaded guilty to count(s) one of the superseding indictment filed July 15, 1999

[ ] pleaded nolo contendere to count(s) _____ which was accepted by the court.

[ ] was found guilty on count(s) _____ after a plea of not guilty.

Title & Section

21:846

Nature of Offense

Conspiracy to Manufacture Methamphetamine, a Schedule II Controlled Substance.

Date Offense Concluded

12 Sep 98

Count Number(s)

One

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the sentencing Reform Act of 1984.

[ ] The defendant has found not guilty on count(s)_

[XX] Count(s) two, three, and five ~~(is)~~ (are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's Soc. Sec. No.:
478-76-4951

Defendant's Date of Birth:
November 19, 1957

Defendant's USM No.: 12058-030

Defendant's Residence Address:
In Custody – Bureau of Prisons

Defendant's Mailing Address:
In Custody – Bureau of Prisons

December 20, 1999
Date of Imposition of Judgment

Signature of Judicial Officer

RONALD E. LONGSTAFF,
Chief Judge
U.S. District Court
/s/ Ronald E. Longstaff
Name and Title of Judicial Officer

December 21, 1999

Date

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 240 months.

[XX] The court makes the following recommendations to the Bureau of Prisons: that the defendant be designated to the institution at Pekin, Illinois and that he be provided a substance abuse evaluation and substance abuse counseling and treatment.

[XX] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district:

[ ] at ___ a.m./p.m. on ___.

[ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

[ ] before 2 p.m. on ___.

[ ] as notified by the United States Marshal.

[ ] as notified by the Probation or Pretrial Services Office.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on ___ to ___ at ___ with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall return from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

[XX] The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable.)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without the permission of the court or probation officer;

2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons:

6) the defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant shall participate in a program of testing and treatment for substance abuse as directed by the U.S. Probation Office until such time as he is released from that program by the U.S. Probation Office. The defendant shall not use alcohol and all other intoxicants during this term of supervised release.

2. As directed by the U.S. Probation Office, the defendant shall participate in a mental health evaluation and, if recommended, participate in mental health treatment, which may include compliance with any medical regime recommended by treatment personnel.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 100.00	$	$

[ ] If applicable, restitution amount ordered pursuant to plea agreement.....$ _____

FINE

The above fine includes costs of incarceration and/or supervision in the amount of $ _____.

The defendant shall pay interest on any fine more than $2,500, unless the fine is paid in full before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

[ ] The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

[ ] The interest requirement is waived.

[ ] The interest requirement is modified as follows:

RESTITUTION

[ ] The determination of restitution is deferred until ___. An Amended Judgment in a Criminal Case will be entered after such a determination.

[ ] The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
Totals:	$ _____	$ _____	

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A [XX] In full immediately; or

B [ ] $ _____ immediately, balance due (in accordance with C, D, or E); or

C [ ] not later than _____; or

D [ ] in installments to commence ___ days after the date of this judgment. In the event the entire amount of criminal monetary penalties imposed is not paid prior to the commencement of supervision, the U.S. probation officer shall pursue collection of the amount due, and shall request the court to establish a payment schedule if appropriate; or

E [ ] in ___ (*e.g., equal, weekly, monthly, quarterly*) installments of $ _____ over a period of ___

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* Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994 but before April 23, 1996.

years(s) to commence ___ days after the date of this judgment.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Special instructions regarding the payment of criminal monetary penalties:

[ ] Joint and Several

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

Unless the court has expressly ordered otherwise in the special instructions above, if this judgment imposes a period of imprisonment payment of criminal monetary penalties shall be due during the period of imprisonment. All criminal monetary penalty payments, except those payments made through the Bureau of Prisons' Inmate Financial Responsibility Program are to be made as directed by the court, the probation officer, or the United States attorney.

STATEMENT OF REASONS

[XX] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual finding and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level:	37
Criminal History Category:	I
Imprisonment Range:	240-262 months
Supervised Release Range:	5 years

Fine Range: $ 20,000 to $ 4,000,000

[XX] Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $ _____

[ ] Restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663(d).

[ ] For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some

portion of a restitution order in the foreseeable future under any reasonable schedule of payments.

[ ] Partial restitution is ordered for the following reason(s):

[XX] The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons:

OR

[ ] The sentence departs from the guideline range:

[ ] upon motion of the government, as a result of defendant's substantial assistance.

[ ] for the following specific reasons(s):